

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUAWEI DEVICE CO., LTD., and  
HUAWEI DEVICE USA, INC.,

Defendants.

No. 2:19-cr-00010-RSM

DEFENDANTS' OPPOSITION TO  
GOVERNMENT'S MOTION  
REGARDING THE  
DISCOVERABILITY OF A  
PARTICULAR DOCUMENT

(Noted for May 10, 2019)

Huawei Device Co., Ltd, and Huawei Device USA, Inc. (collectively, "Huawei"), by and through their counsel, hereby oppose the government's motion seeking a determination that a particular document is not discoverable under the government's discovery obligations. The government's own description demonstrates that the document is material to Huawei's defense and may contain favorable information Huawei could use to impeach government witnesses. Because the document was prepared for and provided to T-Mobile, it is not attorney work product or otherwise privileged. The government is therefore obligated to produce the document to Huawei.

**I. BACKGROUND**

In the course of the government's investigation, it received a memorandum from T-Mobile "outlining its position regarding restitution" ("T-Mobile Memorandum"). Mot. at 3. The

1 government acknowledges its obligation to produce the T-Mobile Memorandum, because  
 2 Huawei could use it “to impeach T-Mobile witnesses on the ground that T-Mobile has an  
 3 economic stake in the outcome of the case.” *Id.* at 3 n.2. The government describes the  
 4 document at issue as a responsive memorandum from the government to T-Mobile, “reviewing  
 5 the applicable case law governing restitution, analyzing the facts in the civil trial record under  
 6 this case law, and setting forth legal conclusions under this analysis” (“Government  
 7 Memorandum”). *Id.* at 3. From this context, it is reasonably inferable that the Government’s  
 8 Memorandum rebutted T-Mobile’s claims that it was entitled to massive restitution and  
 9 explained why T-Mobile’s injury was not as extensive as it claimed.

10 The Court denied the government’s initial attempt to obtain an *ex parte* order that the  
 11 Government Memorandum is not discoverable. *Id.* at 2. The government subsequently filed this  
 12 motion on the public docket, again seeking a determination that the Government Memorandum is  
 13 not discoverable. *Id.* at 2. The government also filed an *ex parte* submission seeking to justify  
 14 its refusal to produce the document to Huawei, *id.*, and submitted the memorandum to the Court  
 15 for *in camera* review. *Id.* at 3.

## 16 II. ARGUMENT

### 17 A. Huawei’s Counsel Should Be Permitted to Read the Government Memorandum.

18 The government should not be permitted to argue that its Memorandum is not  
 19 discoverable when counsel for Huawei have not even been provided an opportunity to review it.

20 In criminal cases, *ex parte* proceedings are highly disfavored. *See, e.g., United States v.*  
 21 *Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987) (“[A]dversary proceedings are the norm in our  
 22 system of criminal justice, and *ex parte* proceedings the disfavored exception.”) (citing *United*  
 23 *States v. Bagley*, 473 U.S. 667, 675 (1985)). Absent a compelling justification, “*ex parte*  
 24 proceedings are anathema in our system of justice, and in the context of a criminal trial, may  
 25 amount to a denial of due process.” *Id.* at 1258–59.

26 The government provides no reason why an *ex parte* or *in camera* proceeding is  
 27 necessary with respect to the Government Memorandum. The government relies on cases  
 28

1 permitting *in camera* review of government personnel files and documents containing  
 2 information about other government investigations. *See* Mot. at 3; *United States v. Cadet*, 727  
 3 F.2d 1453, 1467–68 (9th Cir. 1984) (FBI agent personnel files); *Milke v. Ryan*, 711 F.3d 998,  
 4 1016 (9th Cir. 2013) (police detective personnel file and other documents relating to his  
 5 misconduct); *United States v. Calise*, 996 F.2d 1019, 1021 (9th Cir. 1993) (ATF agent personnel  
 6 files); *United States v. Jones*, 612 F.2d 453, 455–56 (9th Cir. 1979) (interview of government  
 7 witness, from which material about other investigations was excised).

8 Here, however, the government does not contend that its Memorandum contains national  
 9 security information, personnel files, information about other government investigations, or any  
 10 other type of particularly sensitive content that Huawei’s counsel should not be permitted to see.  
 11 The government should be ordered to produce the Government Memorandum forthwith so that  
 12 Huawei’s counsel, not the government, can make an informed decision as to whether and how it  
 13 may be used in preparing Huawei’s defense.

14 **B. The Government Memorandum Is Discoverable Because It Is Material to Preparing**  
 15 **Huawei’s Defense and Favorable to Huawei.**

16 Without even reviewing the Memorandum, it is apparent from the government’s motion  
 17 that the Memorandum is discoverable under Federal Rule of Criminal Procedure 16(e)(1) and the  
 18 government’s *Brady* and ethical obligations.

19 Rule 16 states that criminal defendants are entitled to discovery of documents that are  
 20 “material to preparing the defense.” Fed. R. Crim. P. 16(e)(i). This is a “low threshold,” which  
 21 is met if the defendant presents facts tending to show that the government is in possession of  
 22 information helpful to the defense. *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th  
 23 Cir. 2013).

24 The Fifth Amendment requires the prosecution to disclose to the defense all evidence in  
 25 its possession, custody, or control that is favorable to the accused. *See Brady v. Maryland*, 373  
 26 U.S. 83, 87 (1963) (requiring disclosure of exculpatory evidence “material either to guilt or  
 27 punishment”). *Brady* and its progeny impose on the prosecution an affirmative duty to disclose  
 28 favorable information to the defense. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see also*

1 United States Attorneys' Manual § 9-5.001 ("The law requires the disclosure of exculpatory and  
 2 impeachment evidence when such evidence is material to guilt or punishment. . . . [P]rosecutors  
 3 generally must take a broad view of materiality and err on the side of disclosing exculpatory and  
 4 impeachment evidence.") (ellipsis added).

5 In addition, Washington Rule of Professional Conduct 3.8, entitled "Special  
 6 Responsibilities of a Prosecutor," governs proceedings in this Court both by statute and local  
 7 rule. 28 U.S.C. § 530B(a); LCR 83.3(a)(2). Rule 3.8(d), which provides that a prosecutor shall  
 8 "make timely disclosure to the defense of all evidence or information known to the prosecutor  
 9 that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the  
 10 accused or mitigates the offense," imposes a higher standard on prosecutors than the standards  
 11 mandating disclosure of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).  
 12 See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[*Brady*] requires less of the prosecution than  
 13 the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any  
 14 evidence tending to exculpate or mitigate."); see also *State v. Davila*, 357 P.3d 636, 648 n.9  
 15 (Wash. 2015) (en banc) ("the prosecution's failure to disclose potentially exculpatory evidence  
 16 may violate [a Rule of Professional Conduct] governing disclosure obligations, even if the  
 17 evidence ultimately proves nonmaterial under a *Brady* analysis").<sup>1</sup> Based on the above, the  
 18 government is obligated to disclose all documents material to preparing Huawei's defense, as  
 19 well as information favorable to Huawei, including for impeachment purposes.

20 The government has charged Huawei with conspiracy to commit theft of a trade secret  
 21 and attempted theft of a trade secret under 18 U.S.C. § 1832. Indictment ¶¶ 1-52, ECF No. 1.  
 22 The statute requires the government to prove, among other things, that Huawei intended to, or  
 23 knew that its actions would, injure T-Mobile. See 18 U.S.C. § 1832(a). Based on the  
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25  
 26 <sup>1</sup> The Department of Justice also "encourage[s] [prosecutors] to provide discovery broader and more comprehensive  
 27 than the discovery obligations" required by the Federal Rules of Criminal Procedure, the Jencks Act, *Brady*, and  
 28 *Giglio*. Memorandum for Department Prosecutors Re Guidance for Prosecutors Regarding Criminal Discovery (Jan.  
 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html> (last visited Apr. 30, 2019).

1 government's own description, the T-Mobile Memorandum, and by extension the Government  
2 Memorandum, relate directly to the element of intended injury to T-Mobile because they assess  
3 restitution for the injury T-Mobile believes it suffered. As in *Hernandez-Meza*, the Government  
4 Memorandum is material to a key element of the charges against Huawei and is therefore  
5 discoverable under Rule 16. See 720 F.3d at 768 (naturalization certificate for defendant's  
6 mother was material to defense against the alienage element of illegal reentry).

7 The Government Memorandum is also favorable to the accused for purposes of *Brady*  
8 and the prosecutors' ethical obligations. From the government's description, the Government  
9 Memorandum appears likely to rebut T-Mobile's claim that it is entitled to a massive restitution  
10 order. If so, such a document would plainly be favorable to Huawei for purposes of sentencing  
11 should the case proceed to that stage. But more importantly, such a document would be  
12 favorable to Huawei in defending against the required element in the theft of trade secrets  
13 charges that it intended to injure T-Mobile through its actions. Indeed, it would be untenable to  
14 allow the government to argue at trial that the evidence establishes Huawei intended to injure,  
15 and by extension injured, T-Mobile without allowing the defense access to the Government  
16 Memorandum in which it argued that T-Mobile suffered minimal or no injuries. Accordingly,  
17 the government must produce the Government Memorandum pursuant to its *Brady* obligations.

18 The Government Memorandum is also discoverable as impeachment material, a form of  
19 *Brady* material. *Giglio v. United States*, 405 U.S. 150 (1972). The government produced T-  
20 Mobile's Memorandum because Huawei can use it to impeach T-Mobile witnesses based on T-  
21 Mobile's economic stake in the case. Mot. at 3 n.2. But Huawei also can use the Government  
22 Memorandum to impeach government witnesses at trial. For example, if the Government  
23 Memorandum concludes that T-Mobile's estimate of restitution was unrealistically high, it would  
24 assist Huawei in cross-examining T-Mobile witnesses regarding their knowledge of evidence  
25 that Huawei intended to injure T-Mobile. Similarly, if the government calls an FBI agent or an  
26 expert to testify regarding Huawei's alleged actions to injure T-Mobile, Huawei could use the  
27 Government Memorandum to impeach any statements by those witnesses that are inconsistent  
28

1 with the analysis in the document. The government's position that it is obligated to produce one  
 2 of the two memoranda as potential impeachment material, but not the other, is illogical.

3 **C. The Government's Cited Cases Are Inapposite Because They Involve Work Product**  
 4 **Or Privileged Material Not Already Disclosed To A Third Party.**

5 Other cases relied upon by the government to avoid its discovery obligations are readily  
 6 distinguishable and do not justify withholding the Government Memorandum. *See* Mot. at 4.  
 7 Each of those cases involved documents that were protected by the work product doctrine, the  
 8 deliberative process privilege, or the discovery exception in Federal Rule of Criminal Procedure  
 9 16(a)(2) for internal government documents. *See Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir.  
 10 2006) (opinion work product); *United States v. Furrow*, 100 F. Supp. 2d 1174–75 (C.D. Cal.  
 11 2000) (deliberative process privilege and work product); *United States v. Pac. Gas & Elec. Co.*,  
 12 2016 WL 3185008, at \*4–7 (N.D. Cal. June 8, 2016) (Rule 16(a)(2) work product). None of the  
 13 documents at issue in these cases was prepared for and shared with third parties. *See Morris*,  
 14 447 F.3d at 739–40 (routine status report prepared by legal assistant at the Attorney General's  
 15 office); *Furrow*, 100 F. Supp. 2d at 1171–72 (death penalty evaluation form submitted by the  
 16 United States Attorney to the Attorney General's Death Penalty Committee); *United States v.*  
 17 *Pac. Gas & Elec. Co.*, 2016 WL 3185008, at \*1 (N.D. Cal. June 8, 2016) (email attachments sent  
 18 between the government and its retained third party experts).

19 By contrast, the government does not contend that the Government Memorandum is  
 20 attorney work product or otherwise privileged. Nor could it. The government prepared the  
 21 Government Memorandum in response to the T-Mobile Memorandum and shared it with T-  
 22 Mobile. *See* Mot. at 3. The Government Memorandum thus bears no resemblance to the  
 23 privileged and confidential materials exempted from disclosure in the cases the government  
 24 relies upon.

25 **III. CONCLUSION**

26 For the reasons set forth above, Huawei respectfully requests that the Court deny the  
 27 government's motion and order the government to produce the Government Memorandum to  
 28 Huawei.

1 Dated: May 3, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED: May 3, 2019, at Seattle, Washington.

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